Editor's note: 79 I.D. 117; Appealed -- aff'd, sub nom. Ideal Basic Industries, Inc. v. Morton, Civ. No. J-12-74 (D. Alaska Jan. 30, 1974), aff'd, No. 74-2298 (9th Cir. Sept. 28, 1976), rehearing denied (Nov. 16, 1976), 542 F.2d 1364

UNITED STATES
v.
IDEAL CEMENT CO., INC.

79 I.D. 117

IBLA 70-218 Decided March 23, 1972

Petition for reconsideration of a final decision of the Department dated June 25, 1970, by the Director of the Bureau of Land Management, reversing a decision by hearing examiner Graydon E. Holt dated December 1, 1969 (AA 062315), and approving mining claims for patenting.

Petition granted and decisions vacated. Case remanded to hearing examiner for recommended decision.

Mining Claims: Contests--Mining Claims: Determination of Validity

If upon review of the record of contest proceedings it is evident that stipulations of fact by the parties to the proceeding are insufficient to support the finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, a hearing will be ordered to

receive and develop additional evidence on the issues in the contest complaint.

Mining Claims: Contests--Mining Claims: Determination of Validity

The Secretary of the Interior may inquire into all matters vital to the validity of mining claims at any time before the passage of legal title, and, where it is evident upon review of the record of contest proceedings that stipulations of fact by the parties are insufficient to support a finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, may order a hearing to receive and develop additional evidence on the issues in the contest complaint.

Mining Claims: Contests

When parties to a mining contest request that the contest be determined solely on the basis of stipulated facts, the stipulated facts must be read as a whole and each fact interpreted with reference to the whole, and any final determination must be based upon the preponderance of the evidence.

APPEARANCES: Elden M. Gish, Office of the General Counsel, U.S. Department of Agriculture, Forest Service; Robert P. Davison (Holland and Hart), Ideal Cement Company, Inc.; and Beatrice Challiss Laws, Sierra Club, as amicus curiae.

OPINION BY MR. DAY

The Forest Service, U.S. Department of Agriculture, has petitioned the Board of Land Appeals for reconsideration of a final decision of the Department issued on June 25, 1970, by the Director, Bureau of Land Management. 1/ That decision reversed a hearing examiner's determination that certain placer mining claims located in the Tongass National Forest, Alaska, were null and void for lack of discovery of a valuable mineral deposit and ordered that a mineral patent (Anchorage 062315) be issued to the Ideal Cement Company (Ideal). 2/ The Sierra Club, as amicus curiae, filed a brief in support of the Forest Service's position.

1/ The decision of the Director was made prior to the delegation of final review authority to the Board of Land Appeals by the Secretary of the Interior effective July 1, 1970. (211 DM 13.5; 35 F.R. 12081.)

2/ The hearing examiner held the Tom Nos. 1 through 38, inclusive, Tamlin, Winnie, Cheryl N., Carolyn, Mark, Roxann, and Kay placer mining claims of the Ideal Cement Company, Inc., situated on Heceta Island on the west side of Port Alice, Ketchikan Recording District, First Judicial Division, Alaska, within the Craig Ranger District of the Tongass National Forest, Mineral Surveys 2209 and 2228, to be null and void for lack of discovery of a valuable mineral deposit and rejected the mineral patent application filed for the claims under the United States mining laws, as amended, 30 U.S.C. §§ 22, 29 and 35 (1964).

The contest proceeding was initiated upon the request of the Forest Service. The Bureau of Land Management land office at Anchorage issued the complaint on April 1, 1966, alleging that "[n]o discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a proft and it has not been shown that there exists an actual market for these materials." Ideal Cement Company, the contestee, filed a timely answer denying these allegations. Following a prehearing conference, the parties agreed to submit a stipulation of facts and requested that the hearing examiner make his determination solely on the basis of the stipulated facts. 3/

There does not appear to be a dispute between the parties, nor between the Director and hearing examiner, as to the legal principles applicable to a determination of the validity of the discovery on the mining claims in this proceeding. Briefly stated, they are the "prudent man test," which requires that the deposits must be "* * * of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905), and the "marketability test," which requires that in order to qualify as a valuable mineral deposit under the

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3/ See Appendix A for the text of the stipulated facts.

mining laws, it must be shown that the mineral can be "extracted, removed and marketed at a profit." Layman et al. v. Ellis, 52 L.D. 714, 721 (1929); United States v. Coleman, 390 U.S. 599, 600 (1968). The latter test has been refined to require that a "mineral locator * * * must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Solicitor's Opinion, 54 I.D. 294, 296 (1933); Foster v. Seaton, 271 F.2d 836, 838 (1959).

Viewing the stipulations, the hearing examiner found that the cheaper limestone presently available to Ideal from the closer source of Texada Island, British Columbia, precluded any profitable operation of the subject claims situated in Alaska. Therefore, he concluded that the contestee had failed to satisfy the prudent man rule originally enunciated in Castle v. Womble, supra; or the marketability test approved in United States v. Coleman, supra.

Viewing the same stipulations, the Director found that the Forest Service stipulated in paragraphs 8 and 9 that the claims were valid and, therefore, failed to make out a prima facie case of invalidity. He concluded that the stipulated facts were part of the record, that the Forest Service had admitted their validity, and that the Department was bound by them. Accordingly, he reversed the hearing examiner,

and ordered that the application for mineral patent be processed, consistent with his decision.

First, there is no question that prior to the issuance of a patent the lands in mining claims remain subject to the jurisdiction of the Secretary of the Interior, and he may at any time re-examine the correctness of a determination as to the validity of the mining claims, and, if he deems it necessary, remand the case for the taking of additional evidence, after proper notice and opportunity for an adequate hearing. Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); United States v. Clare Williamson, 75 I.D. 338, 342-343 (1968).

It is well settled that "when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid." Foster v. Seaton, supra. Upon first glance at stipulations numbered 8 and 9, it might seem that the parties agreed that the Forest Service had stipulated that a prima facie case did not exist. Number 8 reads in part: "The limestone on the subject claims can be presently used in the manufacture and sale of cement at a profit"; and number 9, states, in part: "The

Seattle, Washington, plant of Ideal is a market for limestone from the subject claims, together with other plants of Ideal along the Pacific coast." (Emphasis added.)

However, these quotes are but two phrases taken out of a set of stipulated facts containing 16 separate paragraphs. A stipulation is an agreement to which the general rules of interpretation of agreements apply. Such an agreement must be read as a whole and every part should be interpreted with reference to the whole. United States v. Utah, Nevada, and California Stage Co., 199 U.S. 414, 423 (1905); 4 Williston on Contracts § 618 (Jaeger ed. 1961); 3 Corbin on Contracts § 549 (1960). Any determination of the validity of the mining claims must be based upon the preponderance of the evidence as deduced from the stipulations as a whole.

The main question presented, then, is whether it has been demonstrated by a preponderance of the evidence that full compliance has been made with the requirements of the mining laws, including a valid discovery of limestone deposits on the mining claims in issue in accordance with the prudent man and marketability tests. A finding that the evidence of the contestee merely meets the evidence of the contestant would not establish the validity of the claims. The validity of the claims must be shown by a preponderance of the evidence with respect to all material facts in issue. Foster v.

Seaton, supra. Also, inherent in any determination is a consideration of whether the evidence of record as a whole affords a sufficient basis upon which to make findings with respect to the charges in the complaint and the consequent validity or invalidity of the claims.

The parties have clearly agreed that the limestone on the claims is not a common variety but of chemical grade quality, at least equal to most deposits of chemical grade limestone, that it is suitable for use in making cement, and that the subject claims are chiefly valuable for limestone. They have also agreed that the claims contain a vast quantity of limestone, estimated at approximately 200,000,000 tons, and the claimants have expended the required $500 in labor or improvements.

With respect to present demand and marketability of the limestone, however, the stipulations are vague and too general and sketchy in nature to be decisive of the issues raised in the complaint. A careful reading of the stipulated facts as a whole reveals, inter alia, that there is a lack of evidence as to other limestone sources, if any, which supply the same general market area, the existence of a present demand for the limestone deposits from the contested claims, a comparison of production and overhead costs of marketing the limestone on the subject claims with evidence

of the costs of producing and marketing other limestone of similar quality in the same general market area, and other like factors.

Further scrutiny of the entire set of stipulated facts reveals that the market on which Ideal relies is limited to its own plants and that Ideal is meeting its present needs at its Seattle, Washington, and Redwood City, California, plants from sources much closer than the subject claims. Among other things, due to cheaper transportation costs, limestone from Texada, British Columbia, is presently being delivered to the Seattle plant at a cost of only $1.48 per ton, as contrasted with an estimated cost of $1.94 per ton from the subject claims. In addition, the calcium carbonate needed in the manufacture of cement at the Redwood City plant is being supplied by shells dredged from the San Francisco Bay. The stipulations do not include estimated per ton costs to Redwood City, but because of the greater distance we might assume that the transportation costs will be greater from the subject claims than from Texada or the San Francisco Bay Area. If we were to base our judgment solely on the cost differential between delivery from Texada or the subject claims to Ideal's Seattle plant (the only costs of record), we would have to conclude that any effort to exploit the limestone on the subject claims would not be prudent.

The stipulations are fraught with conjecture, unsupported predictions, and voids. There is no indication that the present sources

of calcium carbonate will be depleted in the near future. It is stated that there is "a distinct possibility" that Congressional legislation will prohibit the use of dredged shells as a source of calcium carbonate for cement production, and that it is "possible that British Columbia may by legislation forbid exports of limestone." It is also stated that Ideal seeks the limestone on the subject claims as a "domestic reserve against these possibilities." From the information provided, it appears that Ideal may continue to use the closer, cheaper sources of calcium carbonate indefinitely. The stipulation that the "presently used sources of raw materials will be depleted" before the expectant lives of many of the cement plants in the Pacific northwest and northern California have expired is too vague to provide any indication that there is a market or present demand for limestone from the claims. The record does not reveal the expectant lives of any of these plants. However, we do know that Ideal's Seattle plant commenced operation only in 1967 and will undoubtedly be in use for many years to come. The stipulation that the Seattle plant "is a market" cannot stand alone. Other information provided by the stipulations contradicts it and the record is void of any mention of the existence of a present demand.

For the reasons stated above, we find that the stipulations do not provide adequate information on which to base a determination. As the duly delegated representatives of the Secretary of the

Interior we are "charged with seeing * * * that valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, supra at 460; accord, Palmer v. Dredge Corp., 398 F.2d 791, 792 (1968), cert. denied, 393 U.S. 1066 (1969); 4/ to carry out this duty, we must have an adequate record on which to base a decision. It has been recognized that when the record is not sufficient, an administrative agency "should see the record is supplemented before it acts." Isbrandtsen Co., Inc. v. United States, 96 F. Supp. 883, 892 (1951), aff'd per curiam, 342 U.S. 950 (1952).

It is concluded that the stipulated facts will not support a finding that the mining claimants have satisfied the requirements of the mining laws with respect to evidence of present demand and marketability at a profit of the limestone deposits on the contested claims. For this reason and also because the parties are in apparent disagreement as to the proper meaning of certain specific and material statements of fact to which they stipulated, the case must be remanded to the hearing examiner for a hearing

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4/ The Department of the Interior encourages stipulations in mining contests as well as all other proceedings. If properly drafted, such stipulations alleviate the burdens of all parties, including the Government, and the administrative process may be expedited and costs mitigated. However, the Secretary's duties, as stated in Cameron, and the public interest are always paramount to such precedural tools and devices.

to receive and develop positive and definitive additional evidence on the issues raised in the complaint. Upon the conclusion of the hearing, the examiner shall prepare a recommended decision for submission to this Board, together with the complete case record from the initiation of the contest proceeding. A copy of the recommended decision shall be served on each party, and each will be allowed 30 days from service to file with the Board any brief which it may wish to submit. Thereupon, a final administrative determination shall be made by the Board in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Director of the Bureau of Land Management, dated June 25, 1970, and the decision of the hearing examiner, dated December 1, 1969, are vacated, and the case is remanded to the hearing examiner for further proceedings as indicated herein.

James M. Day

ex officio member

We concur:

Newton Frishberg, Chairman

Anne Poindexter Lewis, Member

APPENDIX A

1. Ideal Cement Company ("Ideal") is a Colorado corporation with cement plants, terminal facilities and quarries in 14 states. It has been producing cement from limestone since 1904, and its productive capacity in 1967 was 41,000,000 barrels.

2. The date of location of the limestone placer mining claims involved in this contest and the exploration activity by Ideal are as stated in the patent application.

3. The limestone in the deposit is suitable for making cement.

4. There are approximately 200,000,000 tons of limestone within the subject claims.

5. Ideal has performed the required $500 expenditure per claim.

6. The good faith of Ideal in acquiring these claims is not in issue.

7. The subject claims are chiefly valuable for limestone. The timber has been removed pursuant to license issued by the Forest Service, and the Forest Service at the present time

does not have a program of reseeding or replanting. New growth is dependent upon natural propagation. Neither is the land at the present time included in any recreation or other development plan and is not considered particularly satisfactory for recreation, residence, or industrial use because of terrain and surface baldness.

8. The limestone on the subject claims can be presently used in the manufacture and sale of cement at a profit. The agreed estimated per-ton cost of limestone from these claims delivered at Ideal's Seattle plant is $1.94, including a 25-year amortization charge. Presently, Ideal is supplying its Seattle plant from its own and other limestone sources on Texada, British Columbia, at a per-ton delivered cost of $1.48.

9. The Seattle, Washington, plant of Ideal is a market for limestone from the subject claims, together with other plants of Ideal along the Pacific coast. The Seattle plant site was used by Ideal as a terminal beginning in 1959; the present plant construction began in 1965 and the plant commenced operation March 15, 1967.

10 Ideal considers the subject claims as a source of limestone for the Seattle plant as well as for the Pacific Northwest, California and Alaska areas.

11 The subject claims are readily accessible by water to the limestone market in the Pacific Northwest, Northern California and Alaska. The quarry operation contemplated by Ideal at the subject claims includes facilities to load ships and barges. The claims adjoin a deep-water harbor.

12. A potential general market exists for limestone from southeastern Alaska. There have been no sales of limestone from the subject claims or from any other southeastern Alaska source since 1949 when Permanente Cement Company briefly operated a quarry on Dall Island. Claims are being located in the same general area as the subject claims and presumably patents have been or will be applied for by others, including U.S. Steel, Sinclair Oil Company, and Lone Star Cement Company. The limestone in this deposit is chemical grade quality, being at least equal to most deposits of chemical grade limestone.

13. Based on population projections made by Ideal from data obtained from the U.S. Bureau of the Census, it is

estimated that cement consumption in the Pacific Northwest and Northern California will increase 300% in the next 50 years. Present productive capacity of Ideal in the area is 6.0 million barrels annually. Thus 50 years hence Ideal projects it will need 18,000,000 barrels annual capacity in the Pacific Northwest and Northern California. On a nationwide basis present production for the entire cement industry is, on an annual average, utilizing about 76% total capacity, but Ideal exceeds this industry figure.

14. The Redwood City, California, plant of Ideal uses shell dredged from San Francisco Bay as a source of calcium carbonate. There is a distinct possibility that Congressional legislation will prohibit use of such a source of calcium carbonate for cement production. It is also possible that British Columbia may by legislation forbid exports of limestone. Ideal believes that the subject claims are a legitimate and necessary domestic reserve against these possibilities.

15. Cement plant operators in the Pacific Northwest and Northern California are faced with dwindling supplies of suitable limestone to meet the growing demand for cement. Before the expectant life of many of these plants has

expired the presently used source of raw materials will be depleted. Southeast Alaska affords an excellent quality material, the deposit being superior to most deposits found in the lower states, and the material can be delivered economically and feasibly by water.

16. Ideal has a master plan for development of the subject claims. However, the Forest Service is concerned that there will be no incentive for Ideal to develop the subject claims as a source of limestone.